

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

In re: ) **Case No. 09-42327-rfn13**  
)  
RICHARD LEE ZIMMERMAN, ) Fort Worth, Texas  
) July 14, 2010  
Debtor. ) 1:30 p.m. Calendar  
)  
)  
ZIMMERMAN, ) **Adversary No. 09-4237-rfn**  
)  
Plaintiff, )  
v. ) MOTIONS TO DISMISS ADVERSARY  
) PROCEEDING FILED BY PENNYMAC  
J.P. MORGAN CHASE & COMPANY, ) LOAN SERVICES [#56] AND FNBNI  
et al., ) [#55]  
)  
Defendants. )  
)

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE RUSSELL F. NELMS,  
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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25 Proceedings recorded by digital sound recording;  
transcript produced by transcription service.

1                   FORT WORTH, TEXAS - JULY 14, 2010 - 1:59 P.M.

2                   THE COURT: All right. Okay. Let's do that. We'll  
3 turn to, let's see, this is the Zimmerman case. All right.  
4 And we'll get back to you. Okay. Zimmerman?

5                   MR. NEWBERN: Good afternoon.

6                   THE COURT: Good afternoon.

7                   MR. NEWBERN: St.Clair Newbern III and Clayton Everett  
8 for Plaintiff Richard Lee Zimmerman.

9                   MS. CAMARATA: Christina Camarata for FBNN and for  
10 PennyMac.

11                  THE COURT: Okay.

12                  MS. CAMARATA: FBNN. I had that wrong.

13                  I think probably the easiest one to do would be the motion  
14 to dismiss against FBNN, because that one is pretty much cut  
15 and dried. Don't you agree?

16                  MR. NEWBERN: Sure.

17                  THE COURT: Okay.

18                  MS. CAMARATA: In that motion to dismiss, Your Honor,  
19 what we're saying is that the allegations in the petition are  
20 really, really vague as to any cause of action against FBNN.  
21 What they were was just an intermediary. After the originating  
22 lenders went into receivership with the FDIC, the FDIC created  
23 this corporation, FBNN, to hold the assets. It was a short-  
24 term thing pursuant to what the FDIC normally does when it  
25 takes over failed banks. It opens up another bank immediately

1 so that nothing stops working and that the assets are properly  
2 taken care of and the liabilities are done. And then FNBN then  
3 transferred the asset to PennyMac and actually sold the assets  
4 to PennyMac.

5 In the petition, there really are no causes of action other  
6 than FNBN was in the chain of title.

7 THE COURT: Mr. Newbern?

8 MR. NEWBERN: Your Honor, when we were here, before  
9 we've amended our complaint, at that time, the Court told me to  
10 sue everybody we could find in the chain of title, and we did.  
11 We found FNBN1 in there with one or two transfers. It was  
12 unclear who -- how they got their interest and why they were  
13 transferring it to PennyMac.

14 We recently saw the original documents. In fact, we were  
15 here Monday on a motion for continuance that Judge Lynn  
16 granted. And we saw the documents and we found the document  
17 that was signed by FNBN1. The gentleman who signed that on  
18 behalf of FNBN1 is Mr. -- is it Tomescu? Is that --

19 MS. CAMARATA: His name is Tomescu. I don't know that  
20 he signed that on behalf of --

21 MR. NEWBERN: He did.

22 MS. CAMARATA: No. Actually, an M.J. Lauer from the  
23 FDIC signed it on behalf of the FDIC into FNBN.

24 MR. NEWBERN: My mistake. Anyway, we are trying to  
25 schedule the deposition of Mr. Tomescu, who is the only witness

1 that the Defendant PennyMac has indicated they would call at  
2 the trial, to try to fill in all the holes.

3 And it may be that if FNBN1 doesn't assert a claim against  
4 this property or a lien on the property or interest in the  
5 note, we may be able to eliminate them. But it's not something  
6 that we can do right now. The claim against them would be the  
7 same one that we assert against PennyMac, just they were an --  
8 as counsel says, they were an intermediary. I didn't  
9 understand that until the other day when we were looking at the  
10 documents and that was explained to me, that was their role.

11 THE COURT: How about that, Ms. Camarata? If we  
12 dismissed FNBN1, is there any possibility that FNBN1 would come  
13 back at some later point and say, "Listen, as it turns out, we  
14 were this necessary party. We had to be added because we had  
15 some interest in the property, and so therefore the Court can't  
16 grant complete relief in this case without us being a party"?  
17 Is their position that they have no interest in this  
18 whatsoever?

19 MS. CAMARATA: That is their position, Your Honor.  
20 They have no employees at that corporation. And actually,  
21 under some of the Codes -- and if I can approach for just a  
22 moment, Your Honor?

23 THE COURT: Okay. Sure. Oh, you can give that to me.  
24 Thank you.

25 MS. CAMARATA: The reason I'm giving that to you, Your

1 Honor, is under the tab marked D-4, there are the allonges, two  
2 -- the original allonges, which I also have the ones with me  
3 that Mr. Newbern referenced as of Monday. And he's seen all  
4 these. They've been produced in discovery. They completely  
5 gave away and sold to PennyMac any claim that they had to this  
6 asset. Moreover, because it came from the FDIC, there really  
7 are no allegations that could be held against FNBN or that FNBN  
8 could have against the property itself.

9 PennyMac is the holder. We've got the original note. We  
10 have the original deed of trust that PennyMac does hold. So I  
11 really don't see any way that FNBN could come back into it.

12 And it should be dissolved, if it hasn't been dissolved  
13 already. And that's in 12 U.S.C. 1821, I believe. It talks  
14 about the FDIC and the subsequent corporations and how long  
15 those periods last. And it's usually for a period of two years  
16 after they take over. And then, depending upon if there's an  
17 extension, they can do extensions for up to three years. But  
18 the whole purpose of that really is an intermediary institution  
19 and not something that's going to hang around.

20 MR. NEWBERN: Well, Your Honor, the last two documents  
21 which counsel represents are allonges are interesting in that  
22 one of them is apparently signed in blank and then they've  
23 produced another one where somebody's filled in the name of  
24 PennyMac. I --

25 MS. CAMARATA: Well, Your Honor, the reason I gave

1 those to you is because that's how it is in the original file  
2 that Mr. Newbern reviewed earlier this week. It looks like  
3 they were endorsed in blank and then PennyMac later -- either  
4 PennyMac or FNBN put in the name of PennyMac into that allonge.  
5 And that's in the very next tab to you, Your Honor. That one  
6 wasn't included with the original allonges.

7 MR. NEWBERN: Are you telling me that if I had this  
8 first one that I could just fill my name in on it?

9 MS. CAMARATA: If you had the original document. It's  
10 endorsed in blank, yes.

11 MR. NEWBERN: Well, I would like to inquire of FNBN1  
12 maybe a limited discovery as to how these documents got moved.  
13 But when you've got two documents that purport to be original  
14 allonges and one of them's got a blank, a blank in it that's  
15 signed, and another one that's got the same document that  
16 someone's filled the name in, I think we -- I'd like to know  
17 who filled that in and when they did.

18 She mentioned two years. These are dated December 29,  
19 2008. I think our lawsuit was certainly filed within two  
20 years. It seems like to me we should be able to keep FNBN1 in  
21 here to find out what their claim is, and if --

22 THE COURT: But if you've gotten against FNBN a  
23 concession on the record here that they have no claims to the  
24 property, to the note, no interest in them, no liens, haven't  
25 you gotten everything that your lawsuit, at least as to FNBN,

1 would ask?

2 MR. NEWBERN: If --

3 THE COURT: And I mean, it's one thing to want  
4 discovery. I can understand wanting discovery, and there's  
5 nothing about this that precludes discovery. But --

6 MR. NEWBERN: Well, except there's -- it's a little  
7 easier to take discovery of a party than a nonparty. And if  
8 they're dismissed, --

9 THE COURT: Well, I know that, but you can't go out  
10 and name a bunch of nonparties as parties just because  
11 discovery would be easier. And I understand why you did it the  
12 way you did it the first time around, but I'm just saying, if  
13 they don't claim any interest in anything in this case now, I  
14 don't know how we could keep them in the case just because it  
15 would make discovery easier against them if we did it that way.

16 MR. NEWBERN: If the --

17 MS. CAMARATA: And actually, Your Honor, there are no  
18 employees of that corporation. So I wouldn't even have anybody  
19 that I could present at a deposition.

20 MR. NEWBERN: Well, it says that this M.J. Lauer is  
21 its member. We might not want to depose our employees, but we  
22 might want to depose Mr. Lauer.

23 THE COURT: Of course, you can always depose Mr. Lauer  
24 if you can find him.

25 MR. NEWBERN: Well, --



1 THE COURT: Do we know where Mr. Lauer is?

2 MS. CAMARATA: I believe he was with the FDIC, Your  
3 Honor.

4 MR. NEWBERN: Well, Your Honor, I'd like to keep FNBN1  
5 in here until we have an opportunity to depose him, and it's  
6 clearly easier to depose a party. If they can't produce a  
7 party, that may resolve it. But it seems like --

8 THE COURT: See, but if they couldn't produce a party  
9 and, say, they failed to otherwise properly respond to  
10 discovery and we kept them in the case, then you essentially  
11 get what we're getting here today, which is a ruling in essence  
12 that they have no interest in the property.

13 MR. NEWBERN: Well, --

14 THE COURT: They've got no interest in the property.  
15 They've got no claims against Mr. Zimmerman. Because that  
16 would be the basis upon which I would dismiss the claims  
17 against them, is the concession by their counsel that they have  
18 no claims, no interest, no liens, no nothing.

19 And so since, Ms. Camarata, I think that's what you're  
20 saying, --

21 MS. CAMARATA: That is what I'm saying, Your Honor.

22 THE COURT: -- then I'm going to grant --

23 MS. CAMARATA: And they did not sue the FDIC, who is  
24 also an intervening party, and it basically would be the same  
25 situation.

1 THE COURT: All right.

2 MR. NEWBERN: So that's a no nothing -- a no nothing  
3 judgment against them?

4 THE COURT: So the motion is granted, and it's granted  
5 -- and I'm granting it on the basis that Defendant has no  
6 claims against Mr. Zimmerman and asserts no interest against  
7 any property of the Plaintiff.

8 MR. NEWBERN: Would you like me to prepare an order?

9 THE COURT: And, yes, short of just an absolute  
10 judgment to that effect, I don't think it can get much better  
11 than that.

12 MR. NEWBERN: Okay.

13 THE COURT: Call it a victory, Mr. Newbern.

14 MR. NEWBERN: I'm sorry?

15 THE COURT: I said you can call that a victory. I  
16 realize it may --

17 MR. NEWBERN: We don't know when we're done.

18 THE COURT: Okay.

19 MS. CAMARATA: Thank you, Your Honor.

20 THE COURT: All right. Now, the motion to dismiss --

21 MS. CAMARATA: Against PennyMac.

22 THE COURT: -- PennyMac.

23 MS. CAMARATA: And the basis for this motion is a  
24 little bit different, Your Honor. Basically, there are four  
25 causes of action -- well, five, including damages -- and most

1 of those causes of action had to do with actions by the  
2 originating lender. In addition, most of those causes of  
3 action had to do with causes of action under TILA, Regulation  
4 Z, and some of the federal debt laws, finance laws.

5 All of those have statutes of limitation, and all of those  
6 allegations are barred because they weren't brought in time.  
7 The originating note was signed on October the 14th, 2005.  
8 This lawsuit was filed originally until July 1st of 2009.  
9 There are both one-year statute of limitations and three-year  
10 statute of limitations under the various rulings and causes of  
11 action brought by the Plaintiff. The causes of action then  
12 expired either October 14, 2006 or October 14, 2008, almost a  
13 year before the adversary was filed.

14 Even if those statutes of limitation weren't in there,  
15 however, because the originating lender went into receivership  
16 with the FDIC, 12 U.S.C. 1821 comes into play. And under  
17 1821(d)(13)(D)(ii), --

18 MR. NEWBERN: It looks like exciting reading.

19 MS. CAMARATA: Doesn't it, though? And that's a copy  
20 -- you have a copy of that as well, Your Honor, at #1. It  
21 states that if he doesn't perform his administrative remedies  
22 first, then he's barred from bringing those causes of action.  
23 And there was no complaint ever made to the FDIC, and that  
24 statute has also run.

25 Therefore, we don't believe that he can bring these causes

1 of action in this case.

2 Moreover, according to the complaint that was filed, a lot  
3 of the issues that the Plaintiff is complaining about  
4 surrounded the origination. He said he was told this, he was  
5 told that. However, none of that really matters. We have a  
6 statute of frauds problem as well as 12 U.S.C. 1823 that says  
7 that anything that goes into receivership then has to be in  
8 writing. And that's under 12 U.S.C. E -- (a), (b), (c) and  
9 (d).

10 The only thing in writing is the original note, the  
11 original deed of trust, signed by both Mr. Zimmerman and the  
12 originating lenders. I have those. There is nothing else in  
13 writing that was in the file when the FDIC took it over, except  
14 for the allonges, which I've also produced to Mr. Newbern, and  
15 I've got a copy of those as well with me here today.

16 The only other allegations in the complaint, Your Honor,  
17 are standing as to who's the owner and holder of the note. My  
18 client owns the note. They have the original note. They have  
19 the original deed of trust. We've shown those to the  
20 Plaintiff. We have all the allonges into them. The only  
21 assignment -- this was originally a MERS loan, and it's on the  
22 second page of the deed of trust, and MERS did assign it into  
23 PennyMac as well.

24 Therefore, there's really nothing left in the complaint  
25 that can be brought against PennyMac, and for that reason we're

1 asking that the case against PennyMac be dismissed.

2 THE COURT: Mr. Newbern?

3 MR. NEWBERN: First of all, Your Honor, as we pointed  
4 out in our amended response, all of these matters that they're  
5 raising were waived when they filed their answer before they  
6 filed their motion.

7 THE COURT: Now, did they file them on the same day?

8 MR. NEWBERN: No, sir.

9 THE COURT: Okay. I thought that's what the --

10 MR. NEWBERN: The answer was filed April 13th, and  
11 after the -- and after that they filed a motion to dismiss, --

12 THE COURT: Okay.

13 MR. NEWBERN: -- which was subsequent to that.

14 THE COURT: Okay. And what date did they file the  
15 motion to dismiss?

16 MR. NEWBERN: Docket #53 was the answer. The motion  
17 to dismiss is Docket #56.

18 THE COURT: Okay. So the answer was filed on the 13th  
19 and the motion to dismiss was filed on the 20th? Okay.

20 MR. NEWBERN: Under the case law that we've cited in  
21 our response, they've waived their right to raise these motions  
22 to dismiss.

23 I think that part of what Ms. Camarata said is correct.  
24 Clearly, Cause of Action #4, which covers Paragraphs 93 to 130,  
25 is out because those relate to parties who have been dismissed

1 from the lawsuit: Mr. Lobus, Vericrest Financial, and Deutsche  
2 Bank. Chase Bank still remains. I've been contacted by  
3 counsel for Chase, and they haven't filed anything. I think  
4 they're going to be out as well.

5 But we do have issues that are clearly set forth in our  
6 complaint in -- I think it's Part 4. I'm sorry, the second  
7 cause of action, Paragraphs 78 through 85, which raise the  
8 issue about the validity and priority of liens. We've not had  
9 an opportunity to depose PennyMac about the allonges.

10 I would point out to the Court that when we examined the  
11 allonges on Monday, none of the allonges were attached to the  
12 note. And I believe the law is fairly clear that, for an  
13 allonge to be effective, it has to be affixed to the note. And  
14 the copies of what purported to be originals and copies of what  
15 we were given all -- in some cases appear to be different.  
16 They'll show two-hole punches at the top. Some of them show  
17 none at all. There's information written on them that are not  
18 on others. And I question the authenticity of the documents.  
19 I also question the authenticity of the documents because of  
20 the stamped signatures. If you look at the --

21 MS. CAMARATA: And you have copies of those, Your  
22 Honor. They're copies of the original documents. It should be  
23 like 5, 6. And I also have the originals here in court if  
24 you'd like to see them, Your Honor.

25 MR. NEWBERN: The documents are -- have stamped

1 signatures on them. There's no evidence of any authorization  
2 for the use of the stamp. There's no information that tells us  
3 that Amy Hawkins was the Assistant Vice President of First  
4 National Bank of Arizona on the date that her name was stamped  
5 on the document. In fact, none of the allonges appear to be  
6 original signatures. The allonge to the note from Bank of  
7 Nevada shows Amy Quintero. And if you look at the signatures,  
8 they're exactly the same, which to me indicates that they are  
9 stamped.

10 And I know there are ways to use stamps, but we question  
11 the authenticity of those documents. And just providing us  
12 copies of the allonges that aren't attached to the note does  
13 not entitle the Defendant here, PennyMac, to have this case  
14 dismissed against them.

15 THE COURT: Did you want to respond to the statute of  
16 limitations arguments?

17 MR. NEWBERN: I think the other cause of action -- I  
18 think the only cause of action that remains is the validity and  
19 priority of their lien.

20 THE COURT: Okay. So that would be the second cause  
21 of action?

22 MR. NEWBERN: Yes, sir.

23 THE COURT: And you would agree that the, I guess the  
24 TILA violation, the first cause of action, would be barred by  
25 limitations?

1 MR. NEWBERN: I believe they are.

2 THE COURT: The third cause of action is -- I guess  
3 they're out of the case, right?

4 MR. NEWBERN: It is moot because Vericrest and  
5 Deutsche Bank have been dismissed from -- we've settled with  
6 them and they were dismissed and they've released their  
7 judgments that they obtained up in Colorado.

8 THE COURT: Okay. How about the fourth cause of  
9 action?

10 MR. NEWBERN: That relates to Mr. Lobus and Deutsche  
11 Bank and Vericrest, and they're out. So the only thing we're  
12 left with is the second cause of action. And I think our  
13 pleading there is sufficient to --

14 THE COURT: Okay. Well, I will grant the motion to  
15 dismiss as to all causes of action except for the second cause  
16 of action. The second cause of action does state a claim for  
17 relief on its face. There might be evidence, and maybe it's  
18 even the evidence that's included here within the Plaintiff's  
19 exhibits, but those are exhibits, really, that go outside of  
20 the four corners of the pleadings, which means that we really  
21 have to rely upon extrinsic evidence, which is more in the  
22 nature of a summary judgment as opposed to a motion to dismiss.

23 Moreover, the Court does agree that under Rule 12, as  
24 incorporated into adversary practice by Rule 7012, the motion  
25 to dismiss basically cannot be filed after the filing of an



1 answer. And for that reason alone, the Court would have to  
2 deny the motion to dismiss the second cause of action.

3 But in light of the fact that the Debtor is conceding that  
4 all the other causes of action should be dismissed, then the  
5 Court will grant the motion except as to the second cause of  
6 action.

7 MR. NEWBERN: Okay.

8 MS. CAMARATA: That's fine, Your Honor. We'll go  
9 ahead and do a summary judgment, then.

10 The Court does have discretion to convert the motion to  
11 dismiss to a summary judgment, if it likes. And basically, the  
12 second cause of action was that we have not been able to  
13 produce the original note or deed of trust, and we do have  
14 that.

15 THE COURT: Well, I could do that, but if I'm going to  
16 convert the motion to dismiss to a motion for summary judgment,  
17 I'd have to do so on some type of notice to the nonmoving party  
18 in order to give them the same opportunity to respond to it as  
19 a motion for summary judgment. So, but I think that for  
20 today's purposes, I'm just going to go ahead and grant the  
21 motion for summary judgment except as to the second cause of  
22 action. Okay.

23 MS. CAMARATA: The motion to dismiss?

24 THE COURT: Thank you.

25 MS. CAMARATA: Thank you, Your Honor.

1 THE COURT: The motion to dismiss. That's correct.

2 Thank you.

3 MS. CAMARATA: Thank you, Your Honor.

4 (Proceedings concluded at 2:23 p.m.)

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Kathy Rehling  
Certified Electronic Court Transcriber  
CET\*\*D-444

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Date

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